86 - 1251

No.____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

ASSOCIATED FILM DISTRIBUTION CORPORATION,
AVCO EMBASSY PICTURES CORP.,
BUENA VISTA DISTRIBUTION CO., INC.,
COLUMBIA PICTURES INDUSTRIES, INC.,
FILMWAYS PICTURES, INC.,
METRO-GOLDWYN-MAYER, INC.,
PARAMOUNT PICTURES CORPORATION,
TWENTIETH CENTURY FOX FILM CORPORATION,
UNITED ARTISTS CORPORATION,
UNIVERSAL PICTURES DIVISION OF UNIVERSAL CITY STUDIOS, INC., UNIVERSAL FILM EXCHANGES,
WARNER BROS. INC., and
WARNER BROS. DISTRIBUTING CORPORATION,
Petitioners

v.

THE HONORABLE DICK THORNBURGH and
THE HONORABLE HARVEY BARTLE, III,
BUDCO THEATRES, INC.,
BUDCO QUALITY THEATRES, INC.,
and
FOX THEATRES MANAGEMENT CORP.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Is the Pennsylvania Feature Motion Picture Fair Business Practices Law — which prohibits motion picture distributors from licensing copyrighted films until they have been "trade screened" within Pennsylvania and forbids licenses that provide for any advance payment of rentals, percentage rentals that include guaranteed minimums, or exclusive first-run exhibition periods exceeding 42 days — preempted under the Supremacy Clause because it infringes the affirmative right granted by the Federal Copyright Act to control distribution of copyrighted works?

2. Is the Pennsylvania Act invalid under the First Amendment as construed in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), because it discriminates solely against producers and distributors of motion pictures?

PARTIES TO THE PROCEEDING

All parties to the proceeding in the Court of Appeals are listed in the caption. The parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates of each petitioner are set forth in the following paragraphs.

Associated Film Distribution Corporation is a wholly-owned subsidiary of EMI Films, Inc. and Associated Communications Enterprises, Inc., which, in turn, are wholly-owned subsidiaries of two publicly-held United Kingdom corporations, Thorn EMI Ltd. and Associated Communications Corporation, Ltd. Associated Film Distribution Corporation has a distribution agreement with Universal Pictures Division of Universal City Studios, Inc. in the United States and Canada.

Avco Embassy Pictures Corp. has been succeeded by De Laurentiis Entertainment Group Inc., a publicly-owned corporation.

Buena Vista Distribution Co., Inc. is a wholly-owned subsidiary of The Walt Disney Company, a publicly-owned corporation. A limited partnership, Silver Screen Partners II, has lent money from the proceeds of a public offering to Disney with respect to certain motion pictures and is to be repaid from the proceeds of a distribution agreement between Disney and Buena Vista. Silver Screen Partners II also has entered into a joint venture agreement with Disney to finance, from the balance of the public offering proceeds, and to produce certain other motion pictures and is to be paid from revenues received by the joint venture pursuant to a distribution agreement with Buena Vista. Another limited partnership, Silver Screen Partners III, also has entered into a joint venture agreement with Disney under which it will finance, from the proceeds of a public offering, and produce certain motion pictures and be paid from revenues

received by the joint venture pursuant to a distribution agreement with Buena Vista.

Columbia Pictures Industries, Inc. is a wholly-owned subsidiary of The Coca-Cola Company, a publicly-owned corporation.

Filmways Pictures, Inc. (now Orion Pictures Distribution Corp. by amendment of its charter) is a wholly-owned subsidiary of a publicly-owned corporation, Orion Pictures Corporation (formerly Filmways, Inc.).

Metro-Goldwyn-Mayer, Inc. and United Artists Corporation have been succeeded by MGM/UA Communications Company with regard to the distribution of motion pictures. However, the copyright to certain Metro-Goldwyn-Mayer pictures at issue in this litigation is held by Turner Entertainment Company, a wholly-owned subsidiary of Turner Broadcasting System, Inc., a publicly-owned corporation. MGM/UA Communications Company is also a publicly-owned corporation. Turner Entertainment and MGM/UA have agreements with each other governing the allocation of certain rights and obligations among them.

Paramount Pictures Corporation is a wholly-owned subsidiary of a publicly-owned corporation, Gulf + Western Inc.

Twentieth Century Fox Film Corporation is a wholly-owned subsidiary of a privately-owned corporation.

Universal Pictures is a division of, and Universal Film Exchanges is a wholly-owned subsidiary of, Universal City Studios, Inc., which is a wholly-owned subsidiary of MCA, Inc., a publicly-held corporation.

Warner Bros. Inc. is a wholly-owned subsidiary of Warner Communications Inc., a publicly-held corporation. Warner Bros. Distributing Corporation is a wholly-owned subsidiary of Warner Bros. Inc.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

ASSOCIATED FILM DISTRIBUTION CORPORATION, *et al.*,
Petitioners,

v.

THE HONORABLE DICK THORNBURGH, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, thirteen producers and distributors of feature motion pictures, respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on September 12, 1986. They do so because that judgment involves an important question of the constitutional preemptive effect of federal copyright law that has not been decided by this Court and because it distorts and conflicts with the holding of this Court in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983).

OPINIONS BELOW

The opinion of the Court of Appeals (A1-17) is reported at 800 F.2d 369 (3d Cir. 1986). The district court opinion affirmed by the decision below (A89-141) is reported at 614 F. Supp. 1100 (E.D. Pa. 1985).

An earlier opinion by the district court granting petitioners' motion for summary judgment (A18-69) is reported at 520 F. Supp. 971 (E.D. Pa. 1981). The opinion of the Court of Appeals reversing that decision (A70-88) is reported at 683 F.2d 808 (3d Cir. 1982).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on September 12, 1986. A145-46. A timely petition for rehearing was denied on October 14, 1986. A143-44. On January 5, 1987, Justice Brennan entered an order at Docket No. A-487 extending the time within which this petition could be filed to and including January 26, 1987. This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the constitutionality of the Pennsylvania Feature Motion Picture Fair Business Practices Law, Act No. 1980-14, 1980 Pa. Laws 40, 73 Pa. Stat. Ann. §§ 203-1 to 203-11 (Purdon). The federal constitutional provisions involved are the Copyright Clause, Art. I, § 8, cl. 8; the Supremacy Clause, Art. VI, cl. 2; and the First and Fourteenth Amendments. In addition, this case involves provisions of the Federal Copyright Act, 17 U.S.C. §§ 101, 102, 106, and 302(a). Each of these provisions is set forth in the Appendix, beginning at A147.

STATEMENT OF THE CASE

In 1980, Pennsylvania enacted the Feature Motion Picture Fair Business Practices Law ("the Act"). Under that statute, Pennsylvania imposed extensive regulations on the licensing and distribution of motion pictures for exhibition within the state, regulations that differ substantially from those governing any other industry in Pennsylvania. The special regulations were imposed despite the fact that feature motion pictures are copyrighted works under federal law and are protected by First Amendment guarantees.

Under the Act, a motion picture distributor may not enter negotiations to exhibit a film (or agree to any license terms for exhibition of the film) within Pennsylvania until it first shows the film within Pennsylvania to prospective licensees, even though its right to distribute the film under the Copyright Act attaches before that time. Act § 4 (A155). Negotiation and bidding procedures for the films are restricted by the statute. *Id.* § 8 (A157-58). A license agreement cannot include any guaranteed minimum payment (royalty) if film rental is to be based on a percentage of box office receipts, as is customary in the industry. *Id.* § 5 (A155-56). Nor can an agreement provide for payment of advance film rentals, even if the advances are refundable. *Id.* § 6 (A156). Exclusive first-run exhibitions may not exceed 42 days without provision for expansion. *Id.* § 7 (A156). Exhibitors (but not distributors) are entitled to sue to enforce the Act. *Id.* § 10 (A158).

Soon after the statute was enacted, petitioners instituted this action to declare the Act unconstitutional and enjoin its enforcement because, among other grounds, it is preempted under the Supremacy Clause by federal copyright law and infringes petitioners' First Amendment rights. Jurisdiction was based on 28 U.S.C. § 1331.

In a lengthy opinion one year later, the district court entered summary judgment for petitioners, holding that the Act was invalid on its face because it restricted copyright holders' federal rights to distribute their works and restrained First Amendment activities. A36-68. The court of appeals reversed in an opinion that consisted largely of quotations from *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408 (S.D. Ohio 1980), *aff'd in part, rev'd and remanded in part*, 679 F.2d 656 (6th Cir. 1982), a case that addressed a similar, but less restrictive, Ohio regulatory scheme. A70-88. Noting that "the Act does not take away from plaintiffs and give to another" the copyright holders' federal rights, the court held that the Act was not facially preempted by federal law and remanded for a trial to determine whether its prohibitions "*in fact* 'stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " A86-87 (emphasis in original). Characterizing the Act as "content-neutral . . . economic regulation" (A78, *quoting Allied Artists*, 496 F. Supp. at 432), the court also concluded that it was not facially invalid under the First Amendment and remanded for a trial to determine its "actual impact . . . (if any) on First Amendment values," and an assessment of that impact in relation to the state's interests in enacting the legislation. A80-81.

The non-jury trial lasted for thirty trial days in early 1985. In August, 1985, the district court issued a narrative opinion containing findings of fact and conclusions of law. The court noted that the statute did adversely affect motion picture distributors because, for example, it deprived them of "unearned guarantee income," eliminated the protection that advances had provided against credit risks, restricted distributors' use of marketing strategies for slow release of films into a market, imposed an added cost on film production for advanced screening of films for exhibitors, and lowered

the distributors' percentage film rentals. A104-C5, A108, A109-10, A112-15; *see* A14-15. Nevertheless, the court characterized each of these effects as minimal, and it therefore concluded that the effects neither conflicted with federal copyright policies nor infringed First Amendment interests to such an extent as to render them invalid. A124-37. The court rejected petitioners' reliance on *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), which had been decided after the court of appeals reversed the entry of summary judgment, because, in the district court's view, *Minneapolis Star* was distinguishable as a case dealing only with tax legislation that affected profits and that was not "content-neutral." A126.

On appeal, petitioners argued that the findings by the district court that the Act had *some* adverse effect on motion picture distributors satisfied the court of appeals' mandate that such an effect be proven to establish that the Act conflicted with and was preempted by federal copyright law. The court below held, however, that petitioners were, in effect, arguing once more that the statute was invalid on its face and that the court was not free to reconsider that question in light of its earlier opinion. A12-17.[1] Petitioners also appealed on First Amendment grounds, contending that, because the Act imposed regulations on the distribution of motion pictures, an industry protected by the First Amendment, far different from those imposed on other industries in Pennsylvania, the legislation was invalid under *Minneapolis Star*. The court below held, however, that the analysis in *Minneapolis Star* was applicable only to statutes enacted for

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1. The author of the panel opinion, Judge Sloviter, stated that she believed that at least the statutory prohibition against exclusive first runs exceeding 42 days was in conflict with the Federal Copyright Act and that she would hold it invalid if she were not bound by the earlier opinion by the court of appeals. A17.

the purpose of suppressing expression and that the analysis therefore was not applicable to the Pennsylvania statute. A8-12.

Petitioners filed a timely petition for rehearing in banc, which was heard by nine of the ten judges of the court of appeals then in regular active service (the tenth, Judge Adams, disqualified himself from hearing the case). Although five of those nine judges, including all of the currently active members of the court who were on either of the two panels that had rendered decisions in this case, had sufficient doubts about the result to vote for rehearing (A143-44), the petition was denied because the Third Circuit includes non-participating active judges in calculating a majority vote under Rule 35(a) of the Rules of Appellate Procedure. *See generally Lewis v. University of Pittsburgh*, 725 F.2d 910, 928-30 (3d Cir. 1983) (separate statement by Adams, J.), *cert. denied*, 469 U.S. 892 (1984).

REASONS FOR GRANTING THE WRIT

I. BECAUSE THE PENNSYLVANIA ACT CONFLICTS WITH THE AFFIRMATIVE RIGHT TO DISTRIBUTE COPYRIGHTED WORKS GRANTED TO COPYRIGHT HOLDERS BY CONGRESS, IT IS PREEMPTED BY THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

Section 106(3) of the Federal Copyright Act provides, "the owner of copyright under this title has the exclusive right . . . to distribute copies . . . of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending." This right, along with the other rights granted to copyright holders by Congress, is intended to encourage investment of time, money, and creative powers in the production of new and original works. While creation is the primary *goal* of the Act, reward of those who create, in the form of rights to control and to benefit from the use of copyrighted works, is the *means* Congress selected to achieve its goal. *See, e.g., Sony Corp. v. Universal City Studios,* 464 U.S. 417, 429 (1984); *Mazer v. Stein,* 347 U.S. 201 (1954); H.R. Rep. No. 1476, 94th Cong., 2d Sess. 61, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5659, 5674. *See also Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691, 710 (1984) ("rewarding the creator of copyrighted works" was among "important public purposes" Congress sought to advance).

The rights granted by the Copyright Act take two forms. First, the copyright holder is given the exclusive right to prohibit unauthorized use of copyrighted materials. Copyright Act §§ 501 *et seq.* Second, the copyright holder is given the exclusive right to control the time, mode, and terms under which copyrighted works may be used. Copyright Act § 106. The proscriptive power and

the affirmative grant are interdependent, and they are equally protected and important. But while the proscriptive power to prevent infringement is often litigated, case law on the affirmative rights is sparse, for states have seldom sought to invade those rights directly. In this Court, the cases have dealt solely with taxes and other laws of general application that had only an incidental impact on copyrighted works and applied equally to other industries, sales, or products. *See, e.g., Watson v. Buck,* 313 U.S. 387 (1941); *Fox Film Corp. v. Doyal,* 286 U.S. 123 (1932). *See also United States v. Paramount Pictures,* 334 U.S. 131 (1948); *Interstate Circuit, Inc. v. United States,* 306 U.S. 208 (1939). The few decisions by lower courts have confirmed, however, that, apart from such general regulations, limitation of the affirmative rights by the states is impermissible. *See, e.g., Mills Music, Inc. v. Arizona,* 591 F.2d 1278, 1285 (9th Cir. 1979) ("a state may neither abrogate nor in any way diminish the federally granted and protected rights of a copyright holder") (infringement action); *Remick Music Corp. v. Interstate Hotel Co.,* 58 F. Supp. 523, 540-45 (D. Neb. 1944), *aff'd on other grounds,* 157 F.2d 744 (8th Cir. 1946), *cert. denied,* 329 U.S. 809 (1947).

This case presents to this Court for the first time a pervasive state scheme to restrict the affirmative rights granted by Congress through legislation directed specifically and exclusively at copyrighted works. The provisions of the Pennsylvania Act range from an outright prohibition against exercise of the federal distribution right until long after the copyright attaches to a series of burdensome regulations that have no parallel in the regulations applicable to the marketing of goods in general or even copyright protected goods specifically. These provisions are preempted under the Supremacy Clause.

The clearest example of the conflict between the Copyright Act and the Pennsylvania statute is Section 4 of the Pennsylvania Act. The right to distribute copyrighted works, along with the other rights bestowed by the Copyright Act, attaches from the moment a work takes tangible form. Copyright Act §§ 102(a), 302(a). *See generally Harper & Row, Publishers v. Nation Enterprises,* 471 U.S. 539, 546-47, 552 (1985). For motion pictures, this is no later than the first day of filming. *See* Copyright Act § 101 (definitions of "fixed" and "motion pictures"). *Cf. Baltimore Orioles, Inc. v. Major League Baseball Players Association,* 805 F.2d 663, 668, 674-76 (7th Cir. 1986). But Section 4 prohibits motion picture distributors from licensing — or even negotiating to license — their copyrighted films before the distributors display substantially completed films to exhibitors in Pennsylvania in a "trade screening" session. Thus, although Congress has vested petitioners with exclusive rights to distribute their films under Section 106 before that time, Pennsylvania has flatly prohibited exercise of those rights.

Not only does the Pennsylvania Act deny distributors the right to license motion pictures until long after the copyright attaches, but it also limits the length of exclusive licenses, imposes detailed requirements for the license negotiation process, and prohibits license terms which are common in the licensing of both uncopyrighted products and other copyrighted works. Thus, the statute says that an exclusive license may not exceed 42 days (§ 7), that no license may be for a guaranteed minimum plus a percentage rental (§ 5), and that a distributor may not require or accept advance payment of film rentals even upon delivery of the film and no matter how bad a credit risk the licensee might be (§ 6). These provisions impose serious burdens on petitioners'

exclusive rights to distribute and perform their films.[2]

The prohibition against exclusive runs in excess of 42 days not only infringes the exclusive federal right of distribution, but also the exclusive right bestowed by Section 106(4) of the Copyright Act "to perform the copyrighted work publicly." That right embraces the ability to display a motion picture "at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered." Copyright Act § 101 (definition of "perform . . . publicly"). The Pennsylvania Act, as construed by the Court below (A16), prohibits distributors from displaying a motion picture for the first time at a single theatre for more than 42 days, requiring them to make the film available to additional theatres after that time or to cease displaying the film altogether. Thus, the Act again constrains petitioners' exercise of a federally bestowed right.

The decision below failed to address the Pennsylvania Act's direct infringement of petitioners' affirmative federal rights because the panel believed it was foreclosed from doing so by the court of appeals' earlier decision reversing the entry of summary judgment.

2. When the restrictions contained in the Pennsylvania Act are imagined in other copyright contexts, the chilling effect on the incentive to create original works becomes even more apparent. Consider the following situations: (1) a state law requiring that any book sold in the state in hardback form must also be sold in paperback within 42 days of the first hardback sale; (2) a state law prohibiting an author from contracting with his publisher to share the proceeds generated by the sale of his work if he had received a nonrefundable payment before publication; (3) a state law forbidding a television producer from marketing a series on the basis of pilot films before the entire series was completed and screened for television stations; (4) a state law prohibiting an artist from seeking a security deposit before permitting a gallery to display a collection of his works. Yet, such proscriptions of the affirmative grant embodied in the Copyright Act are precisely what Pennsylvania, in contravention of the method selected by Congress to achieve its goals, has imposed through the statute at issue.

A12-13. That earlier opinion failed to address this aspect of the case, however, holding only that the Pennsylvania statute was not preempted because it did not take distribution rights away from petitioners "and give [them] to another." A87. That discussion confused the proscriptive power with the affirmative rights and therefore was completely beside the point. "Where, as here, the state seeks to deny entirely a federally guaranteed right which Congress itself restricted only to a limited extent . . . it is manifest that the state legislation is in conflict with federal law." *Amalgamated Association of Street Employees v. Wisconsin Employment Relations Board*, 340 U.S. 383, 394 (1951). *Cf. Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. ____, 106 S. Ct. 1395 (1986). The decision below ignored this manifest infirmity.

In this connection, the court below held that the controlling issue was not whether the Pennsylvania Act interferes with Congressionally created distribution or performance rights, but whether such interference thwarts Congress' ultimate aims in enacting federal copyright legislation. *See* A81-88. Thus, the court held that petitioners' proof at trial that the Act actually burdens their federal rights was not determinative; only the trial court's assessment of the statute's effect on Congressional goals controlled. A14-15, A17. But Congress already has concluded that the way to achieve its ultimate objective of advancing the arts is to permit copyright holders to determine exclusively when, where, and how their works may be distributed and performed. Copyright Act § 106; *Harper & Row, supra*, 471 U.S. at 546-47; *Capital Cities, supra*, 467 U.S. at 710. By disregarding this fact, the court below supplanted Congress' view of the best ways to achieve its aims with the lower courts' own views and that of the Pennsylvania Legislature. The Constitution does not authorize such a usurpation of Congressional power. *See* U.S. Const., Art. I, § 8, cl. 8; *Sony, supra*, 464 U.S. at 429. In sum, the

decision below "gave insufficient deference to the scheme established by the Copyright Act for fostering . . . original works." *Harper & Row*, 417 U.S. at 545-46.

In upholding the Pennsylvania Act, the court below inappropriately construed its proscriptions as analogous to regulations of general application that have been upheld by this Court. *See* A84-86, *quoting Allied Artists, supra*, 496 F. Supp. at 446-47 (discussing tax and antitrust decisions by this Court). The analogy is flawed. The Pennsylvania statute is not a general tax or regulation of commercial activity. It contains specific restraints of motion picture licensing practices that are applied by Pennsylvania solely to the motion picture industry in ways that interfere directly with the federal right of distribution. Such restraints should be prohibited. *See* 1 M. Nimmer, *Nimmer on Copyright* § 1.01[B], at 1-14 n.46 (1986). *Cf. Fox Film, supra*, 286 U.S. at 131 ("a *nondiscriminatory* tax on royalties [does not hamper] the exercise of the policy of the copyright statute" (emphasis added)).

The rights bestowed by Section 106 of the Copyright Act do not merely permit copyright holders to prohibit infringement by others. They are also affirmative grants designed by Congress to advance the arts. The Pennsylvania Act interferes directly with these affirmative rights. Accordingly, it is preempted by federal law. U.S. Const., Art. VI, cl. 2. *See generally Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Because the decision below sanctions such a severe infringement on the federal copyright scheme, this Court should grant the petition for certiorari to restore the rights granted by Congress.

II. THE PENNSYLVANIA ACT SINGLES OUT THE MOTION PICTURE INDUSTRY FOR DISPARATE TREATMENT IN VIOLATION OF THE FIRST AMENDMENT.

The Pennsylvania Act regulates the motion picture industry in ways that apply to no other industry in Pennsylvania. It prohibits licensing of feature films prior to trade screening, a practice unheard of in Pennsylvania for such expressive activities as book publishing or television program licensing. It prohibits guarantees in percentage license contracts, terms that are common in other industries as diverse as publishing and commercial real estate leasing. It prohibits advance payments, including security deposits, though such requirements are common terms for avoidance of credit risks in virtually every industry. It requires expanded displays of feature films after 42 days, though no similar requirement is imposed for other creative works such as theatre productions or book publishing. The legislation is targeted at the motion picture industry and deliberately restricts the right to distribute feature films, an activity protected by the First Amendment. *See generally Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952). The First and Fourteenth Amendments prohibit such discriminatory regulation of the motion picture industry.

This conclusion flows directly from this Court's decision in *Minneapolis Star, supra*. At issue in that case was a Minnesota tax on the use, storage, or consumption of tangible personal property, including, in the case of newspapers, the value of the ink and paper consumed by a publication in excess of $100,000 per year. 460 U.S. at 577-78. The tax was imposed on newspapers in a manner different from the way in which it was applied to other commodities and industries in Minnesota. The state argued that the tax actually favored the newspapers

because it was applied only to their component products, rather than finished products (as was the case for other businesses), and because there was a $100,000 exemption. This Court nevertheless held that the tax violated the First Amendment because it discriminated with respect to an industry engaged in the business of free expression and such disparate treatment was not necessary to achieve a state interest of compelling importance. 460 U.S. at 585.[3]

The court below recognized that the rationale of *Minneapolis Star* could apply not just to taxes, but to disparate regulatory treatment such as that at issue here. A11. It held, however, that *Minneapolis Star* does not apply to this case because the Pennsylvania Act was not "designed to single out the motion picture industry in order to suppress its expressive conduct" and because "only the latter type of differential treatment . . . triggers the 'compelling interest' analysis of *Minneapolis Star*." A10. That holding distorts *Minneapolis Star* and is in conflict with this Court's opinion.

In holding the Minnesota tax invalid, this Court in *Minneapolis Star* emphasized that it did not intend to "impugn the motives of the Minnesota Legislature." 460 U.S. at 592. There was "no legislative history and no indication, apart from the structure of the tax itself, of any impermissible or censorial motive on the part of the legislature." *Id.* at 580 (footnote omitted). Such a motive would have made the tax invalid under established precedents such as *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). Because there was no evidence in *Minneapolis Star* of an intent to suppress expression, the Court had to evaluate the case as one of first impression.

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3. The Court also held that the Minnesota tax was invalid because it affected only a segment of the press — large newspapers. 460 U.S. at 591-92. Here too the state legislation targets only a segment of businesses engaged in expression — motion picture producers and distributors.

460 U.S. at 579-80. Doing so, it formulated the rule that even benign differential treatment is invalid unless justified by "a counterbalancing interest of compelling importance." *Id.* at 585. The Court explained that this rule applies even to differential treatment that, like the Minnesota use tax, might actually be more favorable to First Amendment entities, reasoning that favorable discrimination would create a precedent that might be used to impose more burdensome differential treatment at a later time. *Id.* at 588.

Thus, the holding below that *Minneapolis Star* is inapposite in the absence of a purpose to suppress expression was clearly wrong. The holding distorts this Court's decision, and under it the Third Circuit has signaled a retreat toward the law as it had been understood before *Minneapolis Star* was decided. If the holding is permitted to stand, this Court's declaration that discrimination based on First Amendment activity is inherently invidious will be eviscerated. This Court should grant the petition for certiorari to restore the vitality of its holding in *Minneapolis Star* and to mandate that the courts below apply to this case the proper constitutional analysis set forth in that decision.

CONCLUSION

The decision below approves of state legislation that restricts, and, in some instances, completely forbids, exercise of federal rights bestowed on copyright holders by Congress, and it sanctions an infringement of First Amendment rights by a holding directly in conflict with this Court's decision in *Minneapolis Star*. For these reasons, petitioners respectfully request that this Court grant their petition for certiorari.

Respectfully submitted,

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